In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 379

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al., appellants

v.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, et al.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

REPLY BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

BURDEN OF PROOF

The complaint charges that the Commission "misconstrued the law and erred in holding that the burden of justifying said proposed rates was upon the plaintiff railroad company, and in requiring plaintiff to sustain such burden, whereas no such burden is imposed under the law upon railroad companies proposing reduced rates" (R. 5). The District Court stated that "there is no

presumption that a rate so initiated is unreasonably low. On the contrary the burden is upon the party complaining to establish that fact, and in the absence of evidence the initiate rate must stand" (R. 51).

In this Court the Chicago, Milwaukee, St. Paul & Pacific Railroad Company argues that "the Government loses sight of the real objection to the requirement on the part of the Commission that the Milwaukee proposing reduced rates assume the burden of justifying their lawfulness. It is not a question of order of witnesses or procedure before the Commission, but a question as to *whether or not, lacking evidence, the Commission may require the schedules to be canceled.*" (Italics supplied; Brief for Chicago, Milwaukee, St. Paul & Pacific Railroad Company, p. 22; see also Brief for the Binkley Mining Company, p. 12.)

In reply, the Government submits the following:

(1) First, it may be noted that the Milwaukee contends that the question of placing the burden of proof is "not a question of order of witnesses or procedure" but that it is "a question as to whether or not, lacking evidence, the Commission may require the schedules to be canceled." Thus stated, the objection relates solely to the sufficiency of the evidence, and this question is treated by the Government in its brief (pp. 48–61).

(2) It may be noted further that the question of burden of proof *is* a rule of procedure, contrary to

the assumption of the appellee railroad. Wigmore, Evidence, 2 ed., vol. 5, p. 2484 *et seq.;* Thayer, Evidence, 388. Section 17 of the Interstate Commerce Act provides that "the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." 24 Stat. 385, Feb. 4, 1887; U. S. C. Tit. 49, Sec. 17 (1). "The Commission is an administrative body. The validity of its proceedings is not dependent upon compliance with procedural rules as to pleading and practice which prevail in courts of law." *Louisville & N. R. Co.* v. *Sloss-Sheffield Steel & Iron Co.,* 295 Fed. 53, 56, affirmed 269 U. S. 217; and see *Arcadia Mills* v. *Carolina, C. & O. Ry.,* 293 Fed. 639, 642; *United States* v. *I. C. C.,* 51 F. (2d) 429, 430.

Appellee railroad points out that the burden of proof is expressly placed upon the carrier to justfy increased rates. 41 Stat. 486, February 28, 1920; U. S. C. Tit. 49, Sec. 15 (7). Upon the basis of this provision and the rule of construction "*expressio unius est exclusio alterius*", the railroad appellee argues that, since a carrier may propose whatever rates it will in the exercise of managerial judgment, in all other cases the burden must fall not upon those proposing the rates but upon those opposing rates. (Brief for the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, pp. 20–23.)

On the contrary, however, Section 17 of the Act gives the Commission discretion to "conduct

its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice", subject only, it is submitted, to the constitutional requirements of notice and fair hearing. The statute placing the burden of proof upon the carrier in cases where rate increases are proposed cuts down the discretion of the Commission with respect to this particular class of cases, but it does not cut down the discretion of the Commission in all others. As to them, Section 17 remains standing. If, therefore, it were the fact that in the present case the burden of proof was placed upon the appellee carrier, it was within the discretion of the Commission so to place it. The argument of the appellee is based merely upon a rule of construction which "must yield whenever a contrary intention is apparent." *Springer* v. *Philippine Islands,* 277 U. S. 189, 206; *United States* v. *Barnes,* 222 U. S. 513, 519.

(3) Appellees were given a full and fair hearing. As pointed out by the Government in its brief (pp. 61–63), appellees introduced evidence and one of them introduced rebuttal evidence. There is no claim or contention of prejudice or surprise. Although appellee asserted in its petition for rehearing and reconsideration (R. 223) that in its first report the Commission had "erred" in placing upon it the burden of justifying the proposed rates, it did not then assert that it had been prejudiced, nor did it offer to submit any further evidence

whatever. It did not then nor does it now claim that the Commission prevented it from submitting all the evidence it desired, or failed in any way to accord a full and fair hearing.

As this Court said in the *New England Divisions Case,* 261 U. S. 184, 200:

> A full hearing is one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken.

Here, with all the evidence in, the Commission issued its order based upon substantial evidence; and this is all that is required under the leading decisions of this Court. *I. C. C.* v. *Ill. Cent. R. Co.,* 215 U. S. 452, 470; *I. C. C.* v. *Union Pac. R. Co.,* 222 U. S. 541, 547.

(4) Finally, the position taken that the burden of proof was placed upon the appellee, Chicago, Milwaukee, St. Paul & Pacific Railroad Company, seems by no means clearly warranted. It is true that the first report of the Commission states, "We find that the proposed schedules have not been justified" (R. 12). But these words standing alone are at the most ambiguous so far as the burden of proof is concerned. They must, moreover, be read with the rest of the report. It is true also that in the second report, in quoting from Ex-lake Iron Ore from Chicago to Granite City, 123 I. C. C. 503,

the Commission said (R. 46), "* * * In suspension proceedings, in view of the burden of proof, we are justified in condemning a proposed rate, protested as too low, if the carriers which sponsor it do not sufficiently show that it will cause gain rather than loss." It seems fair to conclude, however, that it was not this part of the quotation upon which the Commission was especially relying but upon that which immediately followed, to wit, "But our authority, in our opinion, goes further. We are justified in condemning a proposed rate as too low if the evidence warrants the conclusion that it will, because of its lowness, tend to precipitate changes in rate structure or in traffic which will be harmful to the public interest, having in mind our responsibility for railroad earnings in general under Section 15a" (R. 46). Similar language is used in another part of the second report of the Commission (R. 42). This language and both reports when read as a whole indicate, it is submitted, that the order of the Commission was based not upon a mere technical ruling as to the burden of proof and the failure of the appellee to sustain the same, but upon the broader proposition that upon the whole of the evidence, in the large that introduced by the protestants, although in part also that furnished by the appellee, it was apparent (R. 46–47)—

> that the proposed rates, if permited to become effective, would lead to a disruption of the rate structure on coal in the Indiana and

> related areas, thus impairing the revenue of the carriers serving those areas and their ability to provide the adequate and efficient transportation service contemplated by Section 15a of the act; that they would cause a disruption of the individual groups from which the rates are proposed; and that they would cause a disruption of the long-standing rate relation existing for competitive purposes, between the several Indiana groups.
>
> We find that the proposed rates would be unreasonable and in violation of sections 1 (5) and 15a (2) of the act.

This is an affirmative finding reached, it is submitted, as a result of the whole of the evidence, not a mere finding that the appellee had failed to sustain the burden of showing that the proposed rates were lawful.

As this Court said in *State of Ohio* v. *United States*, 292 U. S. 498, 506:

> The assertion that appellants were denied a fair hearing rests not upon any refusal to receive evidence tendered, but upon the Commission's alleged misconception of the rules as to burden of proof. It is said that from the outset the Commission acted upon a presumption that the reduced Ohio rates were unlawful and cast on the appellants the burden of overcoming it by a preponderance of proof impossible of production.

This complaint is founded upon a portion of the opening sentence of the report and two sentences near its close and by an analysis of the remainder of the report intended to show that the Commission gave too little weight to appellants' evidence and too much to that in opposition. On examination of the record, the report and the findings, we are satisfied there is no adequate foundation for the contention. The excerpts from the report which are cited, when read in their context, indicate only that the Commission intended fairly to inquire with respect to the lawfulness of the attacked rates and, after evaluating all the proofs on both sides, concluded that the preponderance was heavily against the appellants. The hearing was fair.

CONCLUSION

An examination of the precise nature of certain of the objections of appellees, and of the ruling of the lower court, and of the reports of the Commission discloses that appellees are asking this Court to sustain the lower court in weighing the evidence anew and setting aside the findings and conclusions of the Commission based upon substantial evidence. As indicating clearly that appellees are requesting this Court to sustain the lower court in substituting its judgment for that of the Commission on an administrative matter, the language in the brief of

appellee, Milwaukee Railroad, at p. 32, is especially pertinent: "The Commission has the power to suspend and require to be canceled any such proposed rates as might be made if found to be unlawful." This language is used in connection with the statement that "no witness representing any railroad (i. e., any competing railroad) appeared at the hearing and testified that his line would reduce any rates in the event the proposed rates became effective." That is to say, the appellee is asserting that if competing carriers in the future propose rate reductions, with consequent disruption of the rate level in the area and impairment of the revenues of the carriers, then "the Commission has the power to suspend and the power to cancel any such proposed rates if found to be unlawful." In short, the lower court took the novel position and the appellee makes here the ingenious argument that, though the lower court should set aside the order of the Commission cancelling appellee's proposed rate reductions, nevertheless the lower court could in the future sustain the Commission if carriers competing with the appellee should propose reductions of their rates. That is to say, the lower court substituted its judgment for that of the Commission with respect to the proposed rate reductions of the appellee and set the Commission's order in the instant case aside, but held itself free

to sustain the orders of the Commission if subsequently proposed rate reductions by competing carriers were found by it to be unlawful. And appellee would have this Court sustain the lower court in this holding.

This distinction between the order of the Commission in the instant case and orders which it may make in the future with respect to proposed reductions by competing carriers is apparently based upon the proposition that the Commission's order in the instant case was itself grounded upon a prediction, i. e., upon the probability that competing carriers would propose rate reductions if appellee's proposed reduced rates were allowed to become effective. This prediction by the Commission was proper. As has been demonstrated in the main brief of the Government and the Interstate Commerce Commission, this prediction of the Commission was based upon testimony and upon the experience of the Commission. All findings by the Commission with respect to the future effects of rates are, in a sense, predictions. They are, nevertheless, valid if sustained by evidence as interpreted by the observation and experience of this expert body.

It is submitted that the decree of the lower court should be reversed and the bill of complaint dismissed.

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